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Supreme Court of the United States

March Term, 1945

No. 1083

MURRAY COHEN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

March Term, 1945

MURRAY COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Murray Cohen, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (#248 February Term 1945) entered on March 12th, 1945.

History of Case

This case arose in the United States District Court, Southern District of New York, where Petitioner was indicted on the 15th day of February, 1944.

The indictment contained one count and charged the defendant Cohen and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Training and Service Act (Title 50, Sec. 311 United States Code Annotated). This case was tried before Hon.

John W. Holland, District Judge and a Jury. Petitioner was found guilty and was sentenced on September 28, 1944 to a term of imprisonment of three years and fined the sum of $500, bail was granted in the sum of $2500 pending appeal.

On appeal to the United States Circuit Court for the Second Circuit the Judgment of conviction was affirmed. A *Per Curiam* opinion was written by the Circuit Court in this case.

Summary Statement of the Matter Involved

The indictment charged the Petitioner and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Service and Training Act (U. S. C. A. 311, Record on Appeal, pages 5, 6 and 7), to wit; "to knowingly make and be a party to the making of a false statement as to the physical unfitness and non-liability of Murray Cohen, Petitioner herein for service under the provisions of the Selective Service Training Act and Rules, Regulations and Directions made pursuant hereto."

The indictment contains further language showing the alleged method adopted by the defendants in carrying out their conspiracy and specifically mentions the making of a false statement as to the physical unfitness of Murray Cohen, the Petitioner, in that he was therein falsely represented as having a hernia and entitled to a classification of 4F on account of such physical ailment (pp. 5, 6 and 7).

John Francis Leonard the person indicted with the Petitioner was a member of the Local Draft Board #20 where Petitioner registered.

The Government upon the trial proved the making of the false statement as to the physical unfitness and non-liability of Petitioner through the testimony of the said John Francis Leonard who having pleaded guilty to the indictment, testified on behalf of the Government and admitted that he was the one who made the false statement in the record as to the physical unfitness of Murray Cohen (p. 84). Said Leonard testified that he used the form of another person who had been found to have had a hernia by the medical examiners and said that he erased the name of such other person and inserted the name of Petitioner in place thereof all of which he did at the Local Draft Board in the presence of one Wilson a co-member of the Draft Board on or about May 20, 1943. Murray Cohen, your Petitioner was not present at the time such false statement was made in his physical record (pp. 84-131).

Your Petitioner took the stand in his own defense and denied that he had ever conspired with either Leonard or Wilson to do this unlawful act and never knew that it had been done or was going to be done until he was informed of such fact by the agents of the Federal Bureau of Investigation—in the month of December, 1943, some seven months after its commission (pp. 184-187, 221).

The trial of the case hinged mostly on the contention made by your Petitioner that he first learned of the alteration in his physical record from the mouths of the members of the Federal Bureau of Investigation in the month of December, 1943 seven months after his said record had been altered as hereinabove mentioned.

The Government called in rebuttal the two members of the Federal Bureau of Investigation who had examined

Petitioner on December 6, 1943 (pp. 275, *et seq.* and pp. 306, *et seq.*). These agents testified that they made written notes of all questions propounded to and answers given by your Petitioner on December 6, 1943 (pp. 285, 290, 301 and 314). They both stated that they had examined their notes on the day of trial in preparation for their testimony (pp. 285-291, 314). Both these witnesses testified as refreshed from their notes as to each question and answer made upon said examination of Petitioner on December 6, 1943. Their testimony was tantamount to a statement obtained from Petitioner. They both denied that they had informed Petitioner that he was 4F on account of a hernia. They both stated that the word "hernia" was not mentioned during the course of the examination. They likewise stated that the words "hay fever" or "sinus" was not mentioned during the course of said examination of the Petitioner. Such testimony given by these members of the Federal Bureau of Investigation was in direct conflict with the testimony of your Petitioner who had preceded them on the witness stand at the trial. Petitioner had, as the record shows, claimed he suffered from hay fever and sinus (Exhibit "A"). This claim was on file with Petitioner's Draft Board.

Upon the cross-examination of the members of the Federal Bureau of Investigation called as Government witnesses, a request was made by Petitioner's counsel for the production of the written notes so made by these witnesses. Objection was interposed by the District Attorney which objection was sustained by the Trial Court (pp. 290-314). The written notes were not produced and were not examined by the Trial Court.

Questions Involved

1. The Circuit Court of Appeals erred in affirming the Trial Court's ruling in connection with the request made for the production and inspection of the said written notes.

In the instant case the production of the notes was opposed and the Trial Court did not inspect the same (pp. 334-335, 337-338). The inspection and use of said notes was sought for the purpose of contradicting and impeaching these witnesses. These witnesses had made statements refreshed from their own notes as to what Cohen had said to them on December 6, 1943. The production of said notes was objected to by the District Attorney and sustained by the Court. If said notes did not contain contradictory matter why was their production opposed at the trial. Up to the present time, neither your petitioner nor his counsel have any knowledge of what was contained in the said notes so used by the witnesses in this case. If the notes contained contradictory matter the same should have been available to your petitioner for cross-examination and impeachment of the witnesses who made the same. It was shown that the said notes so made by these witnesses related solely to your Petitioner and to no other person or investigation (pp. 314-315). Their testimony having been a recital of what they said was contained in their notes, the notes should have been available to the defense upon the trial to test the credibility of the said witnesses.

2. The Circuit Court of Appeals in examining upon the hearing of this appeal the said written notes which were not part of the record on appeal, committed error.

The error of the Trial Court in refusing the defense counsel's request for inspection and use of the notes was not cured by the examination by the Circuit Court of the notes so allegedly made by these witnesses. The said notes were not contained in the record on appeal to the Circuit Court herein. As a matter of fact, the notes were never in the Trial Court and the Trial Judge did not see the same.

Upon the argument of the appeal in the Circuit Court of Appeals the United States District Attorney handed up the said notes which were not in the record for inspection by that Court. As hereinafter pointed out in our brief we contend that the Circuit Court of Appeals had no right to examine papers not part of the record in that Court and that the examination of the same by the Circuit Court of Appeals did not cure the prejudicial error of the Trial Court made in excluding the use and inspection of the same upon the trial of Petitioner's case.

Reasons for Granting the Writ

Your Petitioner respectfully urges that as shown above and as will be more fully urged in the brief accompanying this petition, the Trial Court and the Circuit Court of Appeals have failed to apply the law relative to the production and inspection of written evidence for the purpose of cross-examining and impeaching a witness.

1. That the ruling made by the Trial Court herein and affirmed by the Circuit Court of Appeals, Second Circuit is in conflict with the decision of the same Circuit Court of Appeals rendered in *United States* v. *Krulewitch*, 2nd Circuit, 145 Fed. (2nd) 76.

2. That the decision of the Circuit Court of Appeals herein with respect to the examination of the said notes in that court is in conflict with the decision of this court in *Edwards* v. *United States*, 312 U. S. 473.

3. That recent decisions rendered in the Circuit Court of Appeals, 2nd Circuit show in the dissents filed therein a conflict as to the rule, applicable with respect to the inspection and use of written statements in testing the credibility of witnesses.

United States v. *Krulewitch*, 145 Fed. (2nd) 76;
United States v. *Jos. Cohen*, 145 Fed. (2nd) 82;
United States v. *Ebeling*, 146 Fed. (2nd) 254.

There should be some clear declaration by this Court as to the proper practice in Federal Courts with respect to the right of inspection and use of written statements in testing the credibility of witnesses in a criminal case. The decision in the *Krulewitch* case (*supra*) recognizes that the Federal practice is unsettled.

Petitioner contends that his rights were prejudiced by the refusal to permit him an inspection and use upon his trial of such written evidence.

The entire case with the above questions and the errors in the record call for the exercise of this Court's power of supervision.

WHEREFORE, your Petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

MURRAY COHEN,
Petitioner.

by THOMAS I. SHERIDAN,
Attorney for Petitioner.

Supreme Court of the United States

March Term, 1945

MURRAY COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Opinions of the Court Below

The *Per Curiam* opinion of the Circuit Court of Appeals is attached to the record hereof and certified by the Clerk of the Circuit Court to this Court.

No opinion was rendered in the District Court.

Statement of the Case

In order to intelligently present the question of law and procedural practice involved herein, it is necessary to state briefly the facts which led to this problem.

The indictment charged the defendant Cohen and one Leonard with the crime of conspiracy to violate the pro-

visions of the Selective Service and Training Act, Sec. 311 U. S. C. A.

The overt act charged in the indictment was "the making of a false statement as to the physical unfitness of defendant Cohen for service under said act".

The Government proved that the false statement (namely the alteration of the physical record) was made by Leonard (co-conspirator).

The only testimony as to the conspiracy itself came from the lips of Leonard, the co-conspirator who, having pleaded guilty herein testified on behalf of the Government.

Cohen took the stand in his own defense and denied that he ever conspired with Leonard or any other person to falsify his physical record. He denied that he knew what Leonard was going to do or had done with his record. He stated that he first learned or heard he was 4F for "hernia" when questioned by the agents of the Federal Bureau of Investigation on December 6, 1943. (The falsification of the physical record by Leonard was done on May 20, 1943, some seven months previous.)

Leonard on his direct examination had testified that Cohen in December, 1943 had asked him (Leonard) to get the list of persons from the Draft Board who had been granted a 4F classification on account of hay fever and/or sinus trouble. Leonard stated that he told Cohen he would get such list, but in fact, never did. This testimony of the Government's only witness regarding the conspiracy weakened the Government's case perceptibly. Cohen had claimed through his doctors as shown by Exhibit "A" on file with his Draft Board that he was suffering from hay fever and sinus and had been operated on and hospitalized

for such ailments. Leonard's testimony therefore to the effect that Cohen in December, 1943 was asking for the list of hay fever and sinus rejects weakened the Government's contention that Cohen was a party to a conspiracy in May of 1943 to make a false statement regarding his physical condition, namely to represent him as having a hernia which in fact, he did not have. In fact, Leonard had kept from Cohen all knowledge of his (Leonard's) act in falsifying and altering the physical record. Cohen's statement, therefore, that it was only when questioned by the members of the Federal Bureau of Investigation on December 6, 1943 that he learned he had been classified 4F for a hernia was vital evidence upon the trial. The Government realizing that Leonard's testimony had weakened its position with regard to the conspiracy called in rebuttal the agents of the Federal Bureau of Investigation in an effort to cure such deficiencies created by Leonard's testimony.

As shown by the summary statement hereinabove the two members of the Federal Bureau of Investigation proceeded to testify as refreshed by notes in writing made by them as of the time of their conversation with defendant Cohen on December 6, 1943. They both admitted having read said notes immediately before taking the witness stand. They both contradicted Cohen's previous testimony that they had questioned him concerning whether he suffered from hernia then or at any time. Both these witnesses denied that they had told Cohen he had been granted a 4F classification on account of hernia. They likewise denied that Cohen stated he believed he had been granted the 4F classification on account of hay fever or sinus or both.

Having testified in direct contradiction to Cohen's testimony as to what was said upon the examination by these agents on December 6, 1943, and it definitely appearing that the agent's testimony was a mere recital of their own written notes, counsel for the defendant Cohen sought an inspection of the witnesses' written notes for the purpose of testing their credibility. Objection was interposed by the District Attorney to the production for inspection and use of the said notes and the objection was sustained by the Trial Court. The written notes, therefore, were never produced for inspection either by defense counsel or by the Trial Court.

Specification of Errors

One: The Circuit Court erred in holding that there was no error committed by the Trial Court in denying the inspection and use of the written notes for the purpose of testing the credibility of the witness.

Two: The Circuit Court of Appeals in examining upon the appeal to that Court, the said written notes, committed error in considering evidence that did not form part of the record on appeal herein.

Argument

I. The practice of permitting inspection and use of written statements to contradict the testimony of a witness in a criminal cause has never, as far as we can find, been ruled on in this Court.

> (See opinions both prevailing and dissenting in *U. S.* v. *Krulewitch*, 145 Fed. 2nd 76.)

> The New York State law definitely permits inspection and use upon cross-examination of statements so made, wherein it is the established practice first to permit an inspection of such statements by the Trial Court, and if, in the opinion of the Court, contradictory matter is reflected in such statements, to permit the use thereof on cross-examination of the witness who made the same.
>
> *People* v. *Walsh*, 262 N. Y. 140, 149, 150;
> *People* v. *Schainuck*, 286 N. Y. 161, 165, 166.

Since the decision in the *Krulewitch* case, *supra*, other Federal decisions dealing with this question show uncertainty and conflict in opinions.

U. S. v. *Ebeling*, 146 Fed. (2nd) 254.

The decision in the *Krulewitch* case, *supra*, marked a trend in the Federal Court to follow the New York State Rule.

U. S. v. *Joseph Cohen*, 145 Fed. (2nd) 82.

In the above case the opinion of the Circuit Court of Appeals, Second Circuit, states at page 92:

> "We have very recently considered this question in United States v. Krulewitch, 145 F. (2d) 76, and we need not repeat what we there said. We held that when statements are taken by the prosecution which appear upon inspection by the judge to contradict the testimony of the witness when he is called at the trial, the accused should be allowed to inspect them, since he cannot otherwise impeach the witness."

In the instant case the written notes were not produced at the trial even for inspection by the Court, said notes

were, therefore, not part of the record on appeal to the Circuit Court. The rule of practice established by the *Krulewitch* case and recognized in the *Cohen* case, *supra*, was not followed by the Trial Court in the instant case. The Trial Court not having inspected the notes, and defense counsel having been denied inspection, the question as to whether the said notes contained contradictory matter could not be determined upon the trial. Such denial of inspection was prejudicial error.

In the *Ebeling* and *Joseph Cohen* cases, *supra*, the Trial Court first inspected the written statements and both statements were made a part of the record on appeal. In the instant case the Trial Court did not inspect said written notes and the notes are not a part of the record. The error committed by the Circuit Court in examining evidence not in the record in this case is hereinafter treated in this brief.

It must be remembered in the instant case that the testimony of the two Government witnesses was in fact a recital of what they said was contained in their written notes made at the time of the interrogation of the defendant Cohen. They both admitted refreshing their memories by reading their said notes immediately before taking the witness stand. Under such admitted circumstances their testimony was in effect a statement taken from the defendant Cohen which they refused to produce.

The issue as to Cohen's knowledge of the alteration of his physical record was most important in this case. The Government realized such fact by calling the members of the Federal Bureau of Investigation to negative Cohen's statement that he first learned about a hernia when ques-

tioned by these agents on December 6, 1943, some seven months after the alteration of the record by Leonard. Leonard's testimony regarding his December, 1943 conversation with Cohen concerning the lists of hay-fever rejects had forcibly displayed that Cohen did not know about a hernia falsification in his record even at that time. The issue created thereby was a highly sharp one, and the production of the notes would have undoubtedly tended to release evidence important in ascertaining the truth.

If the notes had been produced at the trial and contained matter contradicting the sworn testimony of these witnesses, it would undoubtedly have had a most important bearing on the result in this case.

II. The Circuit Court of Appeals committed error in examining upon the appeal to that Court the said written notes which were not part of the record. The error of the Trial Court in refusing defense counsel's request for inspection and use of the notes was not cured by the examination by the Circuit Court of the notes purported to have been made by these witnesses. As indicated by the *Per Curiam* Opinion of the Circuit Court herein, the District Attorney, upon the argument of the appeal in that Court, handed up papers purporting to be the written notes in question. The action of the District Attorney was an apparent effort to cure in the Appellate Court what should have been done in the Trial Court.

It is fundamental that Appellate Courts can only consider what is contained in the record on appeal and nothing more.

Edwards v. *U. S.*, 312 U. S. 473.

This Court in the above case stated at pages 481 and 482:

> "Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX."

CONCLUSION

It is respectfully submitted that because of the foregoing reasons the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a Writ of Certiorari.

Respectfully submitted,

THOMAS I. SHERIDAN,
Attorney for Petitioner, Murray Cohen.

Of Counsel,

THOMAS I. SHERIDAN,
DANIEL J. MADIGAN.

Appendix

Exhibit A

WILLIAM SPARER, M.D., D.O.I.
50 East 10th Street
New York City

Stuyvesant 9-2435

4/5/43

To Whom It May Concern:

This is to certify that I have had Mr. Murray Cohen of 200 West 54th St. N.Y.C. under my professional care since January 1943. He had a nasal operation—Submucous Resection and Bilateral Ethmoidectomy performed on Jan. 22, 1943.

For the past three years he suffers from Allergic Rhinitis due to Fall Pollens.

After the Nasal operation, he had a severe Hemorrhage and had to have his nose packed for about two weeks. He required intense cautery to control the bleeding. At present there is recurrent heavy crusting on the left side of the nose as a result of cautery and packing. He is under supportive treatment, and the nose still requires continued attention.

WILLIAM SPARER, M.D.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 347) is not yet reported.

JURISDICTION

The opinion of the circuit court of appeals was filed on February 23, 1945 (R. 347), and the judgment of the court was entered on March 12, 1945 (R. 348). The petition for a writ of certiorari was filed on March 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court committed reversible error in failing to order federal officers to produce notes from which the officers had refreshed their recollections before taking the stand.

STATEMENT

Petitioner and one Leonard were indicted in the United States District Court for the Southern District of New York in one count charging a conspiracy to violate the Selective Training and Service Act by arranging to have a purported report of petitioner's physical examination falsely indicate that he had an irremedial hernia, with the result that he would be classified as unfit for military service (R. 5–7). Leonard pleaded guilty and testified for the Government (R. 3, 68). Petitioner was convicted (R. 331) and sentenced to imprisonment for three years and to pay a fine of $500 (R. 4, 337). On appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was affirmed, *per curiam* (R. 348).

The sufficiency of the evidence to support petitioner's conviction is not here challenged. Briefly, the Government proved that in November 1941, petitioner, a restaurant owner, became friendly with Leonard and one Wilson, both of whom were clerks of the local draft board with which peti-

tioner was registered (R. 68–69).[1] Petitioner gave them free meals in his restaurant and presented them with custom-made suits, shirts, and other gifts (R. 71–74, 75–76). In April 1943, petitioner discussed with Leonard and Wilson the possibility of securing a deferment from the draft (R. 76–77). The three men conceived the idea of having petitioner's name substituted on the medical report of the examination of another registrant who would be found by the examining physicians to be suffering from an ailment rendering him unfit for military service, and decided that hernia would be a suitable defect for their purposes (R. 77–78, 79–80). Leonard and Wilson told petitioner that it would be necessary for him to take a Wasserman test in order to have some proof that he had been in the hospital for examination (R. 78). This plan was carried out. Petitioner merely had a sample of blood taken for a Wasserman test and later Leonard substituted petitioner's name on the medical report of another registrant who had been found by the examining physician to have an inguinal hernia (R. 81–82, 83–89). Petitioner was then classified by the local draft board as unfit for military service (R. 91–92). Thereafter, Leonard and Wilson received further gifts of clothing from petitioner (R. 80, 90–94).

[1] Wilson died before the indictment was returned (see R. 5).

Petitioner took the stand in his own behalf (R. 165). He admitted that he made gifts of clothing to Leonard and Wilson (R. 170–172), but denied any arrangement with them whereby another registrant's medical form would be substituted for his, and denied any agreement by which it was to be made to appear that he had a hernia (R. 174–176). He claimed that the first time he learned that he was deferred because of hernia was when agents of the F. B. I. so informed him in an interview (R. 183–184, 257–258).

In rebuttal, the Government called as witnesses the two F. B. I. agents, Davis and Johnson, who had interviewed petitioner (R. 275, 306). Each testified that they questioned petitioner about his gifts to Wilson (R. 278–279, 308–309); that they asked him if he knew why he was classified 4–F, and that he replied that he did not know, that there were several things wrong with him (R. 276, 307); and that no specific physical ailments were mentioned by petitioner or by either of the agents (R. 280, 310). No notes of this interview were used by the witnesses on direct examination (R. 284, 314). On cross-examination, each of the agents admitted that before taking the witness stand he had refreshed his recollection from notes taken by Johnson during their interview with petitioner (R. 285, 290–291, 314). Petitioner's attorney asked Johnson, the second of the agents who testified, where the notes were, and Johnson

replied that they were in the F. B. I. office in the same building as the courtroom. Petitioner's attorney asked Johnson to get the notes. The prosecuting attorney objected on the ground that petitioner was not entitled to examine the notes, and the court sustained the objection. No exception was taken to this ruling. (R. 314.) Davis testified on cross-examination that the word "hernia" was not mentioned in the interview (R. 288–289), and Johnson testified that "hernia" did not appear in his notes (R. 314–315).

ARGUMENT

While *Goldman* v. *United States,* 316 U. S. 129, does not seem to have come to the attention of the court below, that ruling squarely rejects petitioner's view that a trial court's refusal to require the production of memoranda used by a Government witness to refresh his recollection before taking the stand is reversible error. This Court held that (p. 132):

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge.

It is perfectly clear that there was no abuse of the trial court's discretion in this case. The existence

of the notes was disclosed on agent Davis' testimony but no demand for their production was made at that time (R. 285). When petitioner's counsel finally asked for the production of the notes during agent Johnson's testimony and the trial court denied the request, no exception was taken (R. 314).

"The record here shows nothing to suggest any impeaching value" in the notes (*United States* v. *Ebeling*, 146 F. 2d 254, 257 (C. C. A. 2)), for the agents testified on direct examination without referring to the notes, and their testimony on cross-examination was unequivocal and showed no lapse of memory as to the contents of the notes. Indeed, Johnson stated in response to direct questions by petitioner's counsel that the notes did not contain the word "hernia" or refer to any other specific ailments. Even if the notes did reveal that "hernia" was mentioned, they could not, moreover, have substantially aided petitioner's defense. They could only indicate that the fact that petitioner's classification was based on a hernia was mentioned by the agents. They could in no way indicate that this was a revelation to petitioner.[2]

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[2] In examining the notes in the circuit court of appeals (R. 347), Judge Frank accorded petitioner greater consideration than was technically required, inasmuch as petitioner had failed to note an exception to the trial court's ruling and had failed to have the notes included in the record certified to the circuit court of appeals. See *United States* v. *Ebeling*,

CONCLUSION

The court below could not properly have ruled in petitioner's favor in the light of the decision of this Court in *Goldman* v. *United States*, 316 U. S. 129. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1945.

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146 F. 2d 254 (C. C. A. 2). Petitioner's objection to this favorable treatment (Pet. 6, Br. 12–15) is therefore without merit. In this connection, we are advised by the United States Attorney that upon the argument in the circuit court of appeals, Judge Frank asked petitioner's counsel whether he had any objection to the examination of the notes by the court and that counsel replied that he did not.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN,

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UNITED STATES OF AMERICA,

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REPLY BRIEF FOR PETITIONER

THOMAS I. SHERIDAN,
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11 East 44th Street,
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IN THE

Supreme Court of the United States

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REPLY BRIEF FOR PETITIONER

The Government in its brief in opposition herein has thrice committed a grievous error, the very consistency of which suggests its realization of the violation of petitioner's fundamental rights herein.

At page 5, line 6, again at page 6, line 6 and finally at page 6, footnote 2, line 4, the Government in its brief announces that

> "No exception was taken to the Trial Court's ruling."

with respect to the production of the notes herein.

Such statements are entirely unwarranted as the record shows that the Trial Court allowed exceptions to all rulings on evidentiary matters as well as on motions made during the trial (R. 164, fol. 492).

The statement at page 6 of the Government's brief in opposition reading

> "Even if the notes did reveal that 'hernia' was mentioned, they could not, moreover, have substantially aided petitioner's defense."

is amply answered in the language of Mr. Justice Frank (*United States* v. *Ebeling*, 146 F. (2d) 254 at 259) where he states:

> "We cannot, of course, know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U. S. C. A. Sec. 391."

With respect to that part of footnote 2, page 6 of the brief in opposition reading

> "* * * and (petitioner) had failed to have the notes included in the record certified to the Circuit Court of Appeals." (Parenthesis ours.)

it is respectfully submitted that the notes in the instant case were never produced in the Trial Court at any time. The objection of the United States attorney to their production which was sustained by the Trial Court precluded their being included in the record.

In the *Krulewitch*, *Cohen* and *Ebeling* cases cited in the main brief, the notes were in each instance produced in Court and examined by the Trial Court. In the instant case, however, the notes were not produced in Court, and were not examined by the Trial Court at any time.

With respect to what transpired upon the oral argument in the Circuit Court of Appeals in this case, as mentioned in

footnote 2, page 7 of the Government's brief, it is the petitioner's contention that at no time did he recede from his position as stated in his Reply Brief filed in that Court *viz.*, that the notes should not be considered in the Circuit Court, since they were not a part of the record.

In such Reply Brief filed in the Circuit Court petitioner cited (*Edwards* v. *United States,* 312 U. S. 473, 481) as authority for the position that the notes could not be considered in the Circuit Court of Appeals as they had not been properly identified and were not a part of the record. No statement of counsel upon oral argument which is not part of the record herein can alter the position taken by the petitioner in his brief in the Circuit Court herein. The fact that counsel did not orally object to the examination by one of the Circuit Court judges of evidence not in the record, is not to be considered a consent to such examination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

DANIEL J. MADIGAN,
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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1944

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MURRAY COHEN,

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UNITED STATES OF AMERICA,

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PETITION FOR REHEARING

Your petitioner, Murray Cohen, by this petition moves to have reheard the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit entered on March 12th, 1945 (#248 February Term 1945). The petition for writ having been denied, now your petitioner, Murray Cohen, prays that said petition may be reheard and upon such rehearing that the aforementioned petition be granted.

Questions Involved

FIRST: If the petitioner contends that he did not know that Draft Board records had been falsified in order to give him a 4-F Classification for "hernia", and where it is shown that the petitioner had suffered at or about the time of said falsification of records from a sinus condition and hay fever, and that the said petitioner had been

operated upon for the sinus condition or the like, and where the petitioner contends that he did not know about the "hernia" condition until he was so informed by F.B.I. agents, many months after falsification of records, and where the F.B.I. agent upon rebuttal denies mentioning "hernia" to the said petitioner at a time near petitioner's arrest, and where the F.B.I. agent states in open court on such rebuttal that he refreshed his memory as to what transpired at such meetings with the defendant from notes, and he denies that the word "hernia" is in the notes, is the refusal to produce these notes for the trial at the request of defense counsel, to test or impeach the credibility of the witness upon such rebuttal testimony grossly prejudicial, and should such notes have been presented to the jury as triers of the facts?

SECOND: Where such evidence is used by a witness to refresh his recollection, is such evidence, to wit, notes, admissible to test the memory of the witness and then his credibility, and as such are the notes privileged and do they constitute a part of the Government file where no definite testimony is given to show that they are in the files of the U. S. attorney?

THIRD: Is the excluded evidence reason for reversal, where it is shown that the petitioner was first informed of the "hernia" condition about seven months after falsification of the records, and where the notes would reveal that the defendant was first informed of a "hernia" at such later meeting with Government agents, and wouldn't such disclosure of "hernia" at the later meeting have completely exonerated the defendant of any duplicity, where he contends that the first time he learned of such "hernia" condition was at the meeting with the agents? Wouldn't such notes if they disclosed that the petitioner

was first informed of a "hernia" condition at such later date, brand the Government witness (Leonard) as a conspiring extorter, who by his own admission had altered records and is guilty of a forgery?

FOURTH: After the Federal Court refused to compel the production of the questioned notes, should the Circuit Court of Appeals upon argument of the appeal have looked at the questioned notes, and wasn't such perusal by the Circuit Court prejudicial for the following reasons?

(a) Were these the same notes about which the agent previously testified to with respect to refreshing his recollection, and were they the same notes which the petitioner was not given the opportunity to examine?

(b) Should the Circuit Court of Appeals receive evidence which is not part of the record and then judge as a court of original jurisdiction, which it must necessarily have done, to determine whether or not the refusal to produce such notes was reversible error?

Facts

The indictment charged the Petitioner and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Service and Training Act (U. S. C. A. 311, Record on Appeal, pages 5, 6 and 7), to wit; "to knowingly make and be a party to the making of a false statement as to the physical unfitness and non-liability of Murray Cohen, Petitioner herein for service under the provisions of the Selective Service Training Act and Rules, Regulations and Directions made pursuant hereto."

The indictment contains further language showing the alleged method adopted by the defendants in carrying out their conspiracy and specifically mentions the making of a false statement as to the physical unfitness of Murray Cohen, the Petitioner, in that he was therein falsely represented as having a hernia and entitled to a classification of 4F on account of such physical ailment (pp. 5, 6 and 7).

John Francis Leonard the person indicted with the Petitioner was a member of the Local Draft Board #20 where Petitioner registered.

The Government upon the trial proved the making of the false statement as to the physical unfitness and nonliability of Petitioner through the testimony of the said John Francis Leonard who having pleaded guilty to the indictment, testified on behalf of the Government and admitted that he was the one who made the false statement in the record as to the physical unfitness of Murray Cohen (p. 84). Said Leonard testified that he used the form of another person who had been found to have had a hernia by the medical examiners and said that he erased the name of such other person and inserted the name of Petitioner in place thereof all of which he did at the Local Draft Board in the presence of one Wilson a co-member of the Draft Board on or about May 20, 1943. Murray Cohen, your Petitioner was not present at the time such false statement was made in his physical record (pp. 84-131).

Your Petitioner took the stand in his own defense and denied that he had ever conspired with either Leonard or Wilson to do this unlawful act and never knew that it had been done or was going to be done until he was informed of such fact by the agents of the Federal Bureau of Investigation—in the month of December, 1943, some seven months after its commission (pp. 184-187. 221).

The trial of the case hinged mostly on the contention made by your Petitioner that he first learned of the alteration in his physical record from the mouths of the members of the Federal Bureau of Investigation in the month of December, 1943 seven months after his said record had been altered as hereinabove mentioned.

The Government called in rebuttal the two members of the Federal Bureau of Investigation who had examined Petitioner on December 6, 1943 (pp. 275, *et seq.* and pp. 306, *et seq.*). These agents testified that they made written notes of all questions propounded to and answers given by your Petitioner on December 6, 1943 (pp. 285, 290, 301 and 314). They both stated that they had examined their notes on the day of the trial in preparation for their testimony (pp. 285-291, 314). Both these witnesses testified as refreshed from their notes as to each question and answer made upon said examination of Petitioner on December 6, 1943. Their testimony was tantamount to a statement obtained from Petitioner. They both denied that they had informed Petitioner that he was 4F on account of a hernia. They both stated that the word "hernia" was not mentioned during the course of the examination. They likewise stated that the words "hay fever" or "sinus" was not mentioned during the course of said examination of the Petitioner. Such testimony given by these members of the Federal Bureau of Investigation was in direct conflict with the testimony of your Petitioner who had preceded them on the witness stand at the trial. Petitioner had, as the record shows, claimed he suffered from hay fever and sinus. This claim was on file with Petitioner's Draft Board.

Upon the cross-examination of the members of the Federal Bureau of Investigation called as Government

witnesses, a request was made by Petitioner's counsel for the production of the written notes so made by these witnesses. Objection was interposed by the District Attorney which objection was sustained by the Trial Court (pp. 290-314). The written notes were not produced and were not examined by the Trial Court.

The Government's Contention

The government contended in opposition to the petition that a Trial Court's refusal to require the production of memoranda used by a government witness to refresh his recollection before taking the stand, is not reversible error.

To support this contention, appearing in the Government's brief in opposition to the original petition, the Government sets forth two cases:

(a) *Goldman* v. *United States,* 316 U. S. 129;

(b) *United States* v. *Ebeling,* 146 F. 2nd 254.

The cases cited by the Government are not controlling in the case at bar, and a further examination of these cases will reveal that if anything, they are decisions which aid the petitioner.

The *Goldman* case, *supra,* according to the Government, held as follows:

> "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also part of the Government's files, a large discretion must be allowed the trial judge."

The *Goldman* case, *supra,* had a dissenting opinion by Mr. Justice Murphy, and in which decision Mr. Justice Jackson took no part. It seems to appear further that Justices Stone and Frankfurter do not join the majority of the Court in its opinion.

The *Goldman* case, according to the report of the decision in the Circuit Court, involved notes and memoranda made by agents during the investigation and the material involved constituted a substantial portion of the Government's case, and the question came up upon the trial as well as upon the motion to suppress evidence.

The *Ebeling* case quoted by the Government in its brief in opposition states as follows:

> " 'The record here shows nothing to suggest any impeaching value' in the notes * * *"

Petitioner wishes to set forth now minutes of the trial dealing with the "notes" in question, and will then attempt to show why the case at bar is distinguishable from the *Goldman* and the *Ebeling* cases relied upon by the Government.

Excerpt from Record, page 285:

> *"James A. Davis, Jr.—For Government—*
> *Rebuttal, Cross*
>
> Q. I take it for granted that before you became a witness here you refreshed your recollection? A. Yes, sir.
>
> Q. From a written statement that you had prepared? A. From my reports that I prepared, yes, sir.
>
> Q. When did you prepare those reports? A. At various times during the course of the investigation.
>
> Q. Did you ever prepare a report on December 6th? A. I took notes on that day.

Q. What? A. Notes were taken on that day.

Q. Did you take the notes down? A. No, sir.

Q. Who took the notes down? A. Mr. Johnson.

Q. Where is Mr. Johnson? A. He is not in the city at the present moment.

Q. Have you got the notes? A. I do not have them on me, sir.

Q. So that when you testified today about what took place on December 6th, 1943, you are testifying from your memory, aren't you? A. My refreshed memory, sir."

Excerpts from Record, pages 314, 315:

"Charles M. Johnson—For Government—Rebuttal—Cross

Q. Who took down the notes? A. I took the notes.

Q. How did you take them down? A. In pen and ink.

Q. In longhand or shorthand? A. In longhand.

Q. Did you make them then and there, the notes? A. Yes, sir, I did.

Q. Did you after this meeting was over then transcribe them and more fully set forth what you had learned in your interview? A. I did not.

Q. You kept the original notes? A. No. Immediately after the interview I gave those notes to Mr. Davis.

Q. Were those the notes that you had made during this question and answer period with Mr. Cohen? A. Yes, sir.

Q. When did you see those notes last? A. About 9:45.

Q. Have you got those notes? A. No, sir.

Q. You haven't got them with you? A. No, sir.

Q. Where are they? A. They are in the—to the best of my knowledge they are in the files of the office.

Q. That is, in this building, isn't it? A. Yes, sir.

Q. Would you go there, please, and get those notes?

Mr. Murphy: Your Honor, the witness hasn't said that he needed the notes to testify when he was on the stand this morning.

Mr. Sheridan: I want them this morning.

Mr. Murphy: I submit he is not entitled to examine them.

The Court: I sustain the objection.

Q. Did you read those notes at 9:15 this morning? A. About 9:45 is the last time I saw them.

Q. Was the word 'hernia' on those notes on those notes that you read at 9:50? A. No, sir, it was not.

Q. Was there any question about a hernia being asked? A. No, sir.

Q. Do those notes refer exclusively to Mr. Murray Cohen's case? A. Yes, sir, they do.

Q. In other words, those notes that were made on December 6th that you looked at at 9:50 this morning do not pertain to any case other than the case we are trying? A. That is correct.

Q. Now in those notes are the words 'hay fever' mentioned? A. No, sir, that word is not mentioned.

Q. Is the word 'sinus' mentioned? A. No, sir.

Q. Are the words 'sinus operation'? A. No, sir, it is not.

Q. In those notes is a question asked, either by you or Mr. Davis, of Mr. Cohen in which either one of you say to him, 'Have you a hernia'? A. No, sir. The notes reflect that neither Mr. Davis nor I asked any such question."

Basis for Rehearing

The *Goldman* and *Ebeling* Cases Are Distinguishable from the Case at Bar

FIRST: There is no positive statement in the minutes that the notes involved in the case at bar were part of the Government's files.

SECOND: It appears from the testimony that the notes at best were in the possession of the F.B.I. and were not part of the files of the United States Attorney.

THIRD: In the *Goldman* case, the memoranda involved there covers a substantial portion of the Government's case. In the case at bar the evidence sought was not substantial and was intended to merely impeach the credibility of the witness.

FOURTH: In the *Ebeling* case, there was no reason to suggest that the memoranda sought had impeaching value. In the case at bar, if the notes disclosed that the word "hernia" was used, then the jury could have found that the witness lied and that the petitioner really learned of the "hernia condition" at such later date.

Again, it would appear, according to the *Goldman* case, that where the notes are witnesses' notes and part of the Government files, the Judge is given wide discretion as to their production. In the case at bar, the point of whether the word "hernia" appeared in the notes was so vital to the petitioner's case, it would seem that failure to order the production of the notes would be an abuse of discretion.

WHEREUPON your petitioner respectfully prays that this petition for a rehearing be granted and that the peti-

tion for a writ of certiorari to the U. S. Circuit Court of Appeals for the 2nd Circuit be granted.

Respectfully submitted,

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ABRAHAM TEITELBAUM,
Of Counsel.

Certificate

To the Supreme Court of the United States:

The undersigned, Morris Teitelbaum, of the firm of Teitelbaum & Teitelbaum, the attorneys for petitioner, Murray Cohen, hereby certifies that the foregoing petition for a rehearing is presented on behalf of the petitioner in good faith and not for delay.

Dated, May 10, 1945.

Respectfully submitted,

Morris Teitelbaum,
for Abraham Teitelbaum,
Of Counsel for Petitioner.

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